POLICY ON DISCRIMINATION AND HARASSMENT BECAUSE OF SEXUAL ORIENTATION

ONTARIO
HUMAN RIGHTS
COMMISSION

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PLEASE NOTE

This Policy contains the Commission's interpretation of provisions of the Ontario *Human Rights Code* relating to sexual orientation. They are subject to decisions of the Superior Courts interpreting the *Human Rights Code*. Any questions regarding these Guidelines should be directed to the staff of the Ontario Human Rights Commission.

Commission policies and guidelines set standards for how individuals, employers, service providers and policy makers should act to ensure compliance with the *Code*. They are important because they represent the Commission's interpretation of the *Code* at the time of publication. While they are not binding on the human rights tribunal or on courts, they are often given great deference,[1] applied to the facts of the case before the court or tribunal, and quoted in the decisions of these bodies.

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PART I – THE CONTEXT: SEXUAL ORIENTATION, HUMAN RIGHTS PROTECTIONS, CASE LAW AND LEGISLATION

1. Introduction

The Ontario *Human Rights Code* (the "*Code*") states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.

Every person in Ontario has a right to be free from discrimination and harassment relating to sexual orientation in the all the social areas protected by the *Code*. These include employment, services, goods and facilities, housing accommodation, contracts, and membership in trade unions and vocational associations.

1.1 Sexual Orientation

"Sexual orientation" is not specifically defined in the *Code*. However, the Commission recognizes that sexual orientation is more than simply a "status" that an individual possesses; it is an immutable personal characteristic that forms part of an individual's core identity. Sexual orientation encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations, including intimate emotional and romantic attachments and relationships. It is most commonly gay and lesbian people who make complaints to the Commission on the basis of sexual orientation. However, the protection of the *Code* extends to all individuals who are denied equal treatment because of sexual orientation. The *Code* also prohibits discrimination because of gender identity, such as that faced by transsexual, transgendered and intersex persons. These protections are extended on the basis of sex, rather than sexual orientation, and are discussed in the Commission's *Policy on Discrimination and Harassment Because of Gender Identity*.

Courts at all levels have recognized the past and ongoing disadvantage suffered by lesbian, bisexual and gay people.[2] In *Egan* v. *Canada*, the Supreme Court noted:

> *The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation. They have been discriminated against in their employment and their access to services.*

> *They have been excluded from some aspects of public life solely because of their sexual orientation. The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life.*[3]

While our province's statutes prohibit discrimination and harassment on the basis of sexual orientation, unfair treatment based in homophobia and heterosexism is widespread and even socially accepted among many people. The *Code* requires that the Commission and all organizations under its mandate take steps to prevent and appropriately respond to this unfair treatment, and develop a culture of rights that is inclusive of lesbian, bisexual and gay people.

1.2 Homophobia and Heterosexism

"Homophobia" and "heterosexism" are terms used to describe prejudice relating to sexual orientation. They refer to the assumption that heterosexuality is superior and preferable, and is the only right, normal or moral expression of sexuality. Both may also be the basis for negative treatment of gay, lesbian, or bisexual people based on sexual orientation. Although these terms are closely related and overlapping, they also can emphasize different aspects and expressions of prejudice, and can therefore be helpful in identifying and addressing different aspects of the discrimination and harassment experienced by lesbian, bisexual or gay people.

"Homophobia" is often defined as the irrational aversion to, or fear or hatred of gay, lesbian, or bisexual people and communities, or to behaviours stereotyped as "homosexual". It is commonly used to signify a hostile psychological state in the context of overt discrimination, harassment, or violence against gay, lesbian, or bisexual people.

"Heterosexism" is used to refer to the assumption that everyone is heterosexual. This definition is often used in the context of discrimination against bisexual, lesbian and gay people that is less overt, and which may be unintentional and unrecognized by the person or organization responsible for the discrimination. It can also be useful in understanding and identifying some kinds of institutional or societal bias, although homophobia may also be at play.

1.3 A further word about terminology:

Terminology is fluid, and what is considered appropriate tends to evolve over time. Moreover, people within a group may prefer different terms to describe themselves. However, it is useful to identify terms that are considered most

appropriate in order to avoid compounding a person's experience of prejudice, harassment, or discrimination. It is generally best to use terms by which individuals self-identify, such as "bisexual", "gay", "lesbian" and "two-spirit".

In contemporary usage, "gay" usually refers to men, although it is also used as a general term instead of "homosexual". Some women may identify as "gay", but may prefer the term "lesbian", which refers specifically to women. Aboriginal lesbian, bisexual, or gay people may describe themselves as "two-spirit" or "two-spirited".[4] Individuals may use other terms to describe their sexual orientation; however "gay", "lesbian", and "bisexual" are usually accepted as neutral, general terms.

The term "homosexual" was popularized through medical usage, and has often been used to denigrate and stereotype lesbian and gay people, as well as a range of behaviours and practices ascribed to them. It is sometimes used as a general term, such as in legal documents and medical texts, and some individuals may identify as "homosexual". However, many lesbian and gay people may perceive the term to be clinical or offensive, and bisexual people may also perceive it as exclusionary. It is therefore often better to avoid using the term "homosexual", particularly to refer to an individual, and to use instead the terms by which people self-identify, such as "bisexual", "lesbian" and "gay".

1.4 The purpose and scope of the policy

This policy sets out the position of the Commission with respect to sexual orientation at the time of publication, and replaces the Commission's earlier policy, approved in January 2000. The policy was developed based on extensive research and community consultations, and was updated in 2006 to reflect the significant legal and legislative changes that took place after the initial document was approved.

This policy deals primarily with issues that fall within the Commission's jurisdiction and which can form the subject matter of a complaint to the Commission. The policy is therefore bounded by the provisions of the Ontario *Human Rights Code* and Canada's legal framework for analyzing discrimination. At the same time, the policy interprets the protections in the *Code* in a broad and purposive manner. This is consistent with the principle that the quasi-constitutional status of the *Code* requires that it be given a liberal interpretation that best ensures its anti-discriminatory goals are attained.

Commission policy statements contribute to creating a culture of human rights in Ontario. This policy is intended to help the public understand *Code* protections against discrimination and harassment because of sexual orientation. It is also meant to assist individuals, employers, organizations, providers of services and

housing accommodation, and policy makers in understanding their responsibilities, and acting appropriately to ensure compliance with the *Code*.

2. International Protections:

Several international bodies and covenants recognize the rights of gay, lesbian, and bisexual people, and the need for protection against discrimination and violence based on sexual orientation.

The United Nations *International Covenant on Civil and Political Rights* (1966) (the "*Covenant*") is monitored by the United Nations Human Rights Committee (UNHRC). The *Covenant* does not specifically list sexual orientation as a protected ground; however, in 1994, the UNHRC held that laws criminalizing consensual homosexual conduct violate protections for privacy (article 17) and against discrimination (articles 2 and 26),[5] and have since affirmed the rights of same-sex couples.[6] A number of UN bodies and documents explicitly list sexual orientation in non-discrimination and protections clauses.[7]

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) has been interpreted to extend protections on the basis of sexual orientation. Although the ECHR does not explicitly include sexual orientation in its prohibition on discrimination (Article 14), the European Court of Human Rights has ruled that discrimination and privacy (Article 8) protections extend to sexual orientation and the family relationships of lesbian and gay people.[8] The European Union (EU) has also established important protections based on sexual orientation.[9]

3. The Canadian Context

3.1 Sexual orientation in provincial and federal human rights protections

The Commission first recommended in 1977 that the *Code* should extend protection from discrimination on the basis of sexual orientation[10]. The Ontario legislature amended the *Code* to add the ground of sexual orientation in 1986. In 1996, the Commission initiated a community consultation process, resulting in an options paper [11] and increased efforts in education, enforcement, complaint processing and litigation relating to sexual orientation. Out of this process, the Commission developed the *Policy on Discrimination and Harassment Because of Sexual Orientation*, approved in January 2000.

On June 20, 1996, section 3(1) of the *Canadian Human Rights Act* (CHRA), was amended to include sexual orientation as a protected ground. Administered by the Canadian Human Rights Commission, the CHRA guarantees the right to equality, equal opportunity, fair treatment and an environment free from discrimination in employment and the provision of goods, services, facilities or accommodation within federal jurisdiction.

The ground of sexual orientation is not named in the anti-discrimination section of the *Canadian Charter of Rights and Freedoms* (the "*Charter*": section 15).[12] However, the courts have accepted that section 15 is to be interpreted broadly, and that "analogous" grounds, i.e., personal characteristics other than those specifically listed, may also form the basis for discrimination against a group or individual.[13] In 1995, in *Egan* v. *Canada*,[14] noting the significant historical and ongoing disadvantage faced by gay and lesbian people, the Supreme Court unanimously found that sexual orientation was an analogous ground similar to the other grounds in section 15.

The Supreme Court subsequently found, in *Vriend v. Alberta* (1998),[15] that the Alberta government's assertion that human rights protection was being introduced incrementally did not justify the failure to include protection for lesbians and gay men in the province's human rights legislation, and that the omission of this protection is not reasonable within the meaning of section 1 of the *Charter*. The Court therefore required that sexual orientation be "read into" into the offending legislation, and that Alberta extend protection from discrimination based on sexual orientation. All jurisdictions in Canada now offer protections from discrimination on the basis of sexual orientation in their human rights legislation.

3.2 Recognition of same-sex relationships

Despite legal protections on the basis of sexual orientation, same-sex couples have been subject to specific kinds of discrimination because their relationships were not recognized under the law. Statutes have traditionally used the concept of "spouse" as the basis for allocating rights, powers, benefits and responsibilities to partners, and "spouse" has been implicitly or explicitly defined in heterosexual terms. This was reflected in many Ontario statutes, including the *Code*: however, there have been significant changes in legislation and case law on these matters in recent years.

Same-sex relationships began to gain important recognition through cases involving family law, and denial of spousal survivor, pension, health and employment benefits. In these cases, definitions of spouse and marital status that were limited to opposite-sex couples were found by human rights tribunals to be discriminatory[16] and to constitute denial of the equality rights in section 15 of the *Charter*.[17] In M. v. H, (1999),[18] the Supreme Court of Canada found that

opposite-sex definition of "spouse" in section 29 of Ontario's *Family Law Act*[19] (FLA), which precluded "M" from making an application for support from her former same-sex partner of 12 years, violated section 15 of the *Charter*.

> The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from the benefits of s. 29 of the FLA promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances.[20]

In response, the Ontario legislature amended the *FLA* and a number of other statutes so that they applied to same-sex partners, adding "same-sex partnership status" as a prohibited ground of discrimination under the *Code*.

While these measures were important in extending greater equality rights, there were still many distinctions in law that had discriminatory effects on gay, lesbian and bisexual people, and their families. Some of these distinctions related to access to the actual status of marriage. While opposite-sex couples continued to have the choice to live "common-law" or to become married, those in same-sex couples were still denied this choice. Furthermore, the insistence on a separate category of same-sex partnership, instead of inclusive definitions of terms such as "marital status", "family", "spouse", and "relative" reaffirmed discriminatory views and reinforced the stereotypes held by some, that same sex couples are not "real" families.[21]

This situation shifted significantly on June 10, 2003, when the Ontario Court of Appeal released its decision in *Halpern v. Attorney General of Canada* ("*Halpern*").[22] In its decision, the Ontario Court of Appeal found that the common law definition limiting marriage to persons of the opposite-sex breached the equality rights of same-sex couples under the Canadian *Charter of Rights and Freedoms* (the "*Charter*"). The Court reformulated the definition of marriage as "the voluntary union for life of two persons to the exclusion of all others", effective immediately. Following this decision, the Government of Canada announced that it would not pursue appeals in *Halpern* and similar cases in other provinces.[23] As a result of *Halpern*, Ontario became the first jurisdiction in Canada in which same-sex couples could legally marry. Many other jurisdictions followed suit,[24] and the federal government began a process of addressing the matter.[25]

On March 9, 2005, the Ontario Legislature passed legislation amending a broad range of provincial statutes, changing definitions of spouse and marriage, and removing other heterosexist bias.[26] Changes to the *Code* included removal of the ground of "same-sex partnership", which was no longer required due to the newly inclusive, gender-neutral definitions of "marital status" and "spouse".

On July 20, 2005, the federal *Civil Marriage Act* was signed into law, legalizing same-sex marriage across Canada by defining civil marriage as "the lawful union of two persons to the exclusion of all others".[27] Amendments were made to federal legislation most directly affected by the *Civil Marriage Act*, replacing opposite-sex definitions of "spouse" and other language with gender-neutral terms. Additional barriers were removed by changing legislative references to "natural" parents and "blood" or adoptive relationships, to focus instead on "legal" parent-child and familial relationships.[28]

3.3 A note on balancing rights

A question that has arisen in a number of cases alleging discrimination based on sexual orientation is that of when parties make competing rights claims.[29] It should be noted that the extension of rights to one group does not itself diminish the rights of another group, and it must be established whether there is indeed a genuine conflict. If so, rights claims have been balanced based on the particulars of each case, and the understanding that no right is absolute.[30] Case law has indicated that services normally offered to the public must be offered in a non-discriminatory manner,[31] and that human rights protections are to be interpreted broadly, while defences for discrimination are interpreted narrowly.

PART II - THE POLICY FRAMEWORK

4. Discrimination Based on Sexual Orientation

The *Code* provides that every person has the right to be treated equally without discrimination because of sexual orientation. The purpose of anti-discrimination laws is to prevent the violation of human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice.

There are several ways of defining and identifying discrimination based on sexual orientation. Discrimination because of sexual orientation includes any distinction, including exclusion, restriction or preference based on sexual orientation, that results in the impairment of the recognition of human rights and fundamental freedoms.

In *Andrews v. Law Society of British Columbia,*[32] the Supreme Court of Canada suggests that discrimination may be described as any distinction, conduct or action, whether intentional or not, but based on a person's sexual orientation, which has the effect of either imposing burdens on an individual or group that are not imposed upon others, or withholding or limiting access to opportunity, benefits, and advantages available to other members of society.

In the context of equality claims under s. 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), the Supreme Court of Canada has offered the following three inquiries as a tool for determining whether discrimination has occurred[33]:

1) Differential Treatment
Was there substantively differential treatment, either because of a distinction, exclusion or preference, or because of a failure to take into account the individual's already disadvantaged position within Canadian society?

2) An Enumerated Ground
Was the differential treatment based on an enumerated ground, in this case sexual orientation?

3) Discrimination in a Substantive Sense
Finally, does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, an individual? The discrimination might be based on stereotypes of a presumed group or personal characteristics, or might perpetuate or promote the view that an individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society who is equally deserving of concern, respect and consideration. Does the differential treatment amount to discrimination because it makes distinctions that are offensive to human dignity?

5. Forms of Discrimination Based on Sexual Orientation

Discrimination can take many forms. In many cases it may be direct and intentional, in which an individual or organization treats another person unequally or differently because of sexual orientation.

> **Example:** An employer terminates an employee because of her sexual orientation and her decision to 'come out' at the workplace as a lesbian.[34]

Discrimination can also take place in more subtle and less direct ways. For example, business may wish to refuse employment to gay or lesbian applicants because they think their clients will disapprove. However, it is a clearly established principle in human rights law that customer preference can not be used to justify a discriminatory act.[35] If a person or organization causes or requires another to act on his or her behalf and to discriminate against someone because of their sexual orientation, both parties may be liable.

> **Example:** A landlord has a rule that same-sex couples must rent a two bedroom unit in her apartment building, while opposite-sex couples can rent one bedroom apartments. If a tenant refuses to sublet the apartment to a same-sex couple based on the landlord's "rule", then both the landlord and the tenant may be named as a respondents to a human rights complaint.

Similarly, a placement agency may not refuse work to a bisexual, lesbian or gay person on the instruction of the company contracting their services.

Subtle forms of discrimination can often only be detected upon examining all of the circumstances. Individual acts themselves may be unambiguous or explained away, but when viewed as part of the larger picture, may lead to an inference that discrimination based on sexual orientation was a factor in the treatment a person received.

> **Example:** A woman is one of four people granted job interviews, from a pool of several dozen applicants who sent resumes by mail. When she appears in person, the interviewer seems surprised and uncomfortable, does not make eye contact, and seems to hurry through the interview. The woman feels that the interviewer assumed that she was a lesbian based on aspects of her gender presentation, such as her hairstyle and clothing. She later learns that she did not get the position, but the company does not explain their decision.

It can be difficult to determine whether subtle discrimination is indeed a factor in such situations. They may therefore require investigation and analysis that examines the context, including the presence of comparative evidence contrasting how others were treated, or evidence that a pattern of behaviour exists. An organization should be able to provide a non-discriminatory reason for failing to hire a person.

5.1 Harassment

Harassment because of sexual orientation is not explicitly covered by the *Code*. However, in *Crozier,*[36] the Commission referred a complaint to a Board of Inquiry that dealt in part with harassment based on sexual orientation, based on the notion that harassing behaviour can become a condition of the person's employment and therefore would be a violation of the *Code* for the purposes of making a complaint. The Board of Inquiry, applying principles articulated by the Supreme Court of Canada in *Janzen,*[37] stated that harassment because of sexual orientation is also a form of discrimination based on sexual orientation and is a violation of the *Code*.

Harassment is defined in section 10(1) of the *Code* as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome". The reference to comment or conduct "that is known or ought reasonably to be known to be unwelcome" establishes both a subjective and an objective test for harassment.

The subjective part of the test considers the harasser's own knowledge of how his or her behaviour is being received:

- In some situations, it should be obvious that the conduct or comments will be offensive or unwelcome.
- Some conduct or comments relating to a person's sexual orientation or same-sex marital status may not, on their face, be offensive. However, they may still be "unwelcome" from the perspective of a particular individual. If similar behaviour is repeated despite indications from the individual that it is unwelcome, there may be a violation of the *Code*.

The objective component of the test considers, from the point of view of a "reasonable" third party, how such behaviour would generally be received:

- The determination of the point of view of a "reasonable" third party must take into account the perspective of the person who is harassed.[38]

It is important to note that there is no requirement that the individual object to the harassment in order for there to be a violation of the *Code*, or for a person to claim their rights under the *Code*. An individual who is the target of harassment may be in a vulnerable situation, and afraid of the consequences of speaking out. Employers, landlords, and service providers have an obligation to maintain an

environment that is free of discrimination and harassment, whether or not anyone objects.

Each situation brought to the attention of the Commission through a human rights complaint will be assessed on its own merits. However, the following types of behaviours are examples that would in most instances be viewed as conduct or comments that "ought reasonably to be known to be unwelcome":

- Use of homophobic epithets, slurs, or jokes
- Comments ridiculing individuals because of their sexual orientation, or their same-sex partner or spouse
- Homophobic name calling, 'nicknames', or remarks
- Singling out an individual for "teasing" or jokes related to sexual orientation
- Hints being made about a person's sexual orientation
- Circulating or posting of homophobic, derogatory or offensive signs, caricatures, graffiti, pictures or other materials.

Examples of situations that might be considered harassment include the following:

i) A landlord says to a tenant, who is a member of the gay and lesbian community, "I don't know why you people don't go live with people like yourself, because you sure don't belong here".

ii) Graffiti that is tolerated by a service provider, employer, or landlord who does nothing to remove it may be creating a "poisoned environment".

5.2 Poisoned Environment

The Code definition of harassment refers to more than once incident or comment or conduct. However, even a single statement or incident may be significant or substantial enough to constitute a breach of the *Code* by creating a "poisoned environment" for individuals because of their sexual orientation. A consequence of creating a poisoned environment is that certain individuals are subjected to terms and conditions of employment, tenancy, services, *etc.* that are quite different from those experienced by individuals who are not subjected to these comments or conduct. In such instances, the right to equal treatment may have been violated.

Heterosexist assumptions may lead employers, landlords, service providers and others to believe that there are no gay, lesbian, or bisexual people present, and that homophobic behaviour is therefore not problematic. This is not the case. Homophobic remarks, jokes and innuendo poison the environment for individuals who are, or are perceived to be, bisexual, gay and lesbian, their friends and families, and others.

In the employment context, tribunals have held that the atmosphere of a workplace is a condition of employment just as much as hours of work or rates of pay. The notion of a poisoned environment can also apply in housing, the provision of services, contracting, or membership in a vocational association. Inappropriate comments and conduct are exclusionary and unprofessional, and have a negative and disruptive effect on everyone's environment. It is the responsibility of every service provider, landlord, and employer to ensure that its environment is free from this sort of behaviour, even if no one objects. See section **7. Organizational Responsibility**.

5.3 Confidentiality and Sexual Orientation

An individual's sexual orientation and marital status are personal characteristics that may or may not be known to others. While individuals who are heterosexual may not be concerned about others knowing their sexual orientation or marital status, this may not be the case for individuals who are bisexual, gay or lesbian. Despite the protections set out in the *Code*, and the *Charter*, courts have recognized that individuals and couples who identify themselves as, or are identified by others as gay, lesbian, or bisexual have faced historical disadvantage, and continue to face the very real possibility of being subjected to overt or subtle discrimination or harassment, verbal abuse and physical violence. As a result, they may wish to conceal their sexual orientation, or share the information only with certain individuals.

Comments and questions about an individual's personal or romantic life, such as questions or statements about marital status, whether they will have children, who they are dating, where they go out on weekend evenings, or who they find attractive, may be inappropriate, particularly if the person has voiced or shown discomfort, or avoided responding. Repeated or ongoing comments of this nature may amount to sexual harassment, or make people uncomfortable for reasons relating to other grounds under the *Code*. For gay, lesbian, and bisexual people, this may also amount to harassment or create a poisoned environment relating to sexual orientation. For example:

- If they have not disclosed their sexual orientation, this behaviour pressures them to either disclose or to deny their sexual orientation. This is intrusive, and may seem threatening: it may be the instigator's way of signalling that they know or suspect the person's sexual orientation, and that they may disclose this to others. This plays on the genuine fears of discrimination, harassment, or violence that may have led the person to conceal his or her sexual orientation in the first place.
- Lesbian, bisexual, and gay people, like some other groups, have been targeted by dehumanizing stereotypes that represent them not as whole people, but only in terms of sex, distorting and overemphasizing the sexual aspect of their lives.[39] This pattern of comment or question may

therefore be received as a prurient interest in their sexual lives, relating to stereotypes about their sexual orientation.

Individuals and organizations responding to complaints of discrimination and harassment relating to sexual orientation should take into account the disadvantage that forms part of the perspective of the individual. In order to make a human rights complaint based on sexual orientation, it is not necessary for the person to identify him or herself as gay, lesbian, or bisexual, but to establish discriminatory or harassing treatment relating to sexual orientation. Furthermore, the needs of many lesbian, bisexual or gay people for confidentiality regarding their sexual orientation should come into play in an analysis of whether discrimination or harassment has occurred. See section **9.1 Protecting Confidentiality of Information** for related information about organizational best practices.

5.4 Systemic Discrimination

Discrimination may also be institutional or systemic. Policies, practices, rules or requirements, decision-making processes, and organizational culture may all have discriminatory effects on individuals based on sexual orientation.

5.4.1 Organizational Culture

Organizational culture can be described as shared patterns of informal social behaviour, which are the evidence of deeply held and possibly unconscious values, assumptions, and behavioural norms. An organizational culture that is not inclusive can marginalize lesbian, bisexual or gay people and contribute to homophobia or heterosexism.

Examples may include informal social interactions and subjective assessments of employee skills, such as:

- Jokes or gossip about gay, lesbian and bisexual people.
- Questions or comments presuming that employees have or seek (or should have or want) opposite-sex partners or spouses.
- Exclusion of lesbian or gay employees from social or informational networks.
- Negative employer valuation of the work, skills, or 'fit' of employees who are, or are perceived to be, gay or lesbian, or who do not conform to gender roles.
- Employer bias toward employees who conform to a heterosexual nuclear model of family and marital status, such as in evaluation of employee dedication or reliability.
- Lack of workplace training in non-discrimination, or training that excludes mention of sexual orientation.

> **In Practice:** an employer holds regular holiday parties and picnics as "team-building" events, expecting staff to bring their families. A lesbian employee, aware of the assumption that she is heterosexual, feels uncomfortable attending or bringing her female partner. However, she is concerned that her employer will decide that she is not a "team player" if she does not attend.

Workplace culture has influenced the employee's discomfort in this situation. She is forced to make a choice between three options, all of which are unsatisfactory to her:

1. She may attend alone, but would be misrepresenting herself as single.
2. She may avoid the event altogether, but risks being assessed as a poor "team player".
3. She may also attend with her partner, but this would amount to publicly disclosing her sexual orientation, in a workplace environment that she experiences as heterosexist.

Linking work goals or performance evaluations with social events or with employee's non-work lives, such as expecting family involvement, may lead to exclusion or discrimination based on sexual orientation or other *Code* grounds. Assessment of worker skills should be based on employee performance, and should avoid subjective evaluations that may relate to sexual orientation and other *Code* grounds.

An organization may have genuinely good intentions and wish to foster a positive social environment by hosting or organizing social events, including those involving family. However, it must be clear that any such events are optional, and organizations must take care to avoid creating expectations or requirements that may have exclusionary or discriminatory effects. Prudent employers and organizations may encourage inclusive organizational culture by ensuring that anti-discrimination policies and training are in place. They may thereby be able to prevent exclusion or discrimination, and will be better prepared to address any problems that do arise.

5.4.2 Policies, Procedures and Rules

Policies, procedures, and rules may be non-discriminatory on their face, yet may be applied in a discriminatory way, so that they disproportionately affect members of gay, bisexual or lesbian communities.

> **Example**: A bookstore which serves a largely lesbian, gay, bisexual and transgendered clientele finds that Customs officials regularly delay, confiscate, destroy, damage, prohibit or misclassify as "obscene" materials which they import from their main suppliers in the U.S., while the same or comparable materials imported by other businesses are not similarly

treated. The Supreme Court of Canada found that Canada Customs had discriminated against the store on the basis of sexual orientation, engaged in "systemic targeting" of the bookstore's imports, stigmatized and harassed the appellants, and had violated their legitimate sense of self-worth and dignity. [40]

Rules, policies, procedures, requirements, eligibility criteria or qualifications may appear neutral and be equally applied, but may nonetheless be discriminatory. This is because they may have an adverse impact based on sexual orientation, due to an exclusionary assumption or other bias.

> **Example:** A "birth registration" form contains spaces for "mother" and "father". Lesbians whose female partners have conceived through donor insemination are not allowed to list themselves on the form, and are told that they are required to go through the process of second-parent adoption. This results in increased costs, delay, inconvenience and ongoing difficulties in proving the relationship because of the special position of birth registration in documenting the child's familial relationships. This has been found to be discriminatory, and to amount to denial of their status as parents.[41]

5.4.3 Reasonable and *bona fide* requirements

An organization or institution may seek to justify or maintain a discriminatory policy, practice or decision-making process by demonstrating that it is reasonable and *bona fide* in the circumstances. While such claims are not uncommon, the standard for establishing that a requirement is *bona fide* is high, and there are limited criteria through which it can be met. It is therefore rare for a discriminatory requirement to be found to be *bona fide*.

The Supreme Court of Canada has set out a three-step test for determining whether a discriminatory standard, factor, requirement or rule can be justified as a *bona fide* one. The organization or institution must establish on a balance of probabilities that the standard, factor, requirement or rule:

1. was adopted for a purpose or goal that is rationally connected to the function being performed;
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.[42]

> **In Practice:** In the previous example involving birth registration, the agency argued that the form must list the child's biological parents. However, there was a regulation that allowed male partners of women who have just given birth to list themselves as the father of the child, without any requirement that they establish biological parentage. In fact, men whose partners had conceived through donor insemination ("DI") were protected from having to disclose this fact. The agency's justification was found not to be *bona fide*.[43]

The ultimate issue is whether the person who seeks to justify the discriminatory standard, factor, requirement or rule has shown that accommodation has been incorporated into the standard up to the point of undue hardship.

In this analysis, the procedure used to assess and achieve accommodation is as important as the substantive content of accommodation. The following non-exhaustive factors should be considered in the course of the analysis:

- whether the person responsible for accommodation investigated alternative approaches that do not have a discriminatory effect;
- reasons why viable alternatives were not implemented;
- ability to have differing standards that reflect group or individual differences and capabilities;
- whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner;
- whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies; and
- whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.[44]

> **In Practice:** The agency responsible for birth registration could have accommodated those negatively affected by changing the form to make it more inclusive. They could have accommodated by allowing the same-sex spouse of the birth mother to list herself on the form, whether under "father" or, crossing out that term, as "co-parent", as the complainants attempted to do. Instead, the agency discriminated on the basis of a heterosexist view of family and spousal relationships, reinforced by a standardized form that did not account for the realities of gay and lesbian-headed families.[45]

5.5 Discrimination Because of Association

Persons who are subject to discrimination because of their association with a person protected under the *Code* may file a complaint based on s.12, which protects against "discrimination because of association".

Example: A female tenant of an apartment makes a request for maintenance on her unit. The superintendent denies her request, making negative comments about the tenant's close friend, who is an African-Canadian lesbian.

Example: Several employees of a retail store wear a pin in support of an organization for parents and friends of lesbian, gay, bisexual and transgendered people. Despite the fact that other employees are permitted to wear buttons, pins or other jewellery identifying their affiliation with volunteer and interest groups, the employer insists that employees must remove this particular pin. The employer confiscates some of the pins, stating that they violate the dress code, and threatens to sanction employees who wear them.

Although these individuals were not subjected to discrimination because of their own sexual orientation, they were subjected to discrimination because of their relationship or association with someone identified by a prohibited ground of discrimination.

5.6 Discrimination Because of Perceived Sexual Orientation

The right to equal treatment means that if you have been discriminated against because of bias about sexual orientation, you are entitled to the *Code's* protection. A person does not actually have to be of a particular sexual orientation, but can make a complaint as long as it can be shown that there was unequal treatment based on perceived sexual orientation.

Example: Two women who are not lesbians are dancing together in a bar when the owner interrupts them and asks them to leave. This happens after one of the women overheard the owner say, "I don't want people thinking this is a lesbian bar." Even though the women are not lesbians, they can file a complaint with the Commission because they believe they were subjected to unequal treatment because of perceived sexual orientation.

Example: A male student is subjected to years of homophobic harassment and bullying in school. The student is not gay, and his harassers deny believing that he is gay. However, he is still found to be entitled to protections based on sexual orientation.

Even if the perpetrators deny that they actually believe a person to be gay, lesbian or bisexual, that person may make a human rights complaint if she or he is subject to discrimination or harassment that is homophobic in nature. This is because the treatment is based in prejudice about sexual orientation, and it is the effect of the discrimination or harassment, rather than the intent or belief of the harassers, that is the basis for determining that discrimination has occurred. [46] In

this case, a "reasonable person" would also likely conclude that the perpetrators perceived the person to be gay, lesbian, or bisexual, based on the nature of the harassment.

5.7 Comments or Conduct Need Not be Explicit

Comments or conduct do not need to be explicit to infringe a person's right to equal treatment without discrimination or harassment. Where a person is singled out and treated differently because of sexual orientation, even where the differential treatment does not include explicit reference to sexual orientation or same-sex partnership status, there may still be a violation of the *Code*.

Example: In a workplace, the only gay employee is repeatedly made the brunt of practical jokes and is ridiculed by his co-workers for no apparent reason. The workplace has a history of homophobic attitudes. It may be inferred from the particular circumstances that the treatment is based on sexual orientation although the practical jokes or ridicule may not have contained any direct reference to the employee's sexual orientation.

6. Relationships Between Sexual Orientation and Other *Code* Grounds:

Discrimination based on sexual orientation may involve any other ground of discrimination listed in the *Code*. The grounds of sex, marital status, and family status in particular can have unique relationships to the ground of sexual orientation.

6.1 Sex

Discrimination and harassment on the ground of sexual orientation can involve the ground of sex in a number of ways. Discrimination against people because they are gay, lesbian, or bisexual may take the form of sexual harassment.[47]

> **Example:** After she had worked for about a year in her job, a woman's male co-worker asked her about her sexual orientation. When she indicated that she liked women, he began harassing her, using homophobic epithets, and directing sexually explicit questions, comments and gestures to her. He also made negative, stereotypical comments to her female colleagues about her sexual orientation and practices. [48]

Even if the harassment does not explicitly mention or refer to the person's sexual orientation, if he or she is targeted because of actual or perceived sexual orientation, the complaint may use the ground of sexual orientation.

Gender expression and gender identity are both also addressed in Commission complaints under the ground of sex. In cases of discrimination or harassment, these grounds are sometimes confused with, or serve as a proxy for sexual orientation. For example:

- A co-worker assumes that a transgendered person is gay, and makes homophobic comments in the workplace
- A woman does not dress or wear her hair in a "feminine" style. Her manager makes jokes about sexual orientation and gender identity in her presence and to coworkers
- A landlord believes that a male tenant is gay because his clothing and manner of expression do not seem "masculine." He calls the tenant homophobic names, and refuses to do repairs and maintenance in the apartment.

6.2 Marital Status and Family Status

Marital status is defined under section 10(1) of the *Code* as "the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage". This definition is inclusive of same-sex couples, whether married or "common-law". Therefore, the separate ground of "same-sex partnership" has been removed. Complaints brought by persons regarding discrimination on the basis of a conjugal relationship with a person of the same sex will be addressed as discrimination based on the grounds of sexual orientation and marital status, in addition to any other grounds that may be involved.

Family status is a protected ground in the *Code*, and is defined under section 10(1) as the "status of being in a parent and child relationship". Lesbian, gay and bisexual people may have children through previous heterosexual unions, same-sex relationships with biological parents, adoption, or assistive reproductive technologies. Homophobic stereotypes and lack of legal recognition have both contributed to discrimination faced by these individuals and families. Gay, bisexual and lesbian people may also form important dependency and caregiving relationships that are not currently recognized under this ground of the *Code* or other provincial and federal legislation.

6.3 Intersectionality and Overlapping Grounds

Persons who are bisexual, gay, or lesbian may experience various forms of discrimination, depending on what other characteristics form part of their personal identity or status in a society. A combination of *Code*-related grounds may compound the person's experience of discrimination.

Individuals may experience discrimination or harassment based on one ground in certain contexts, and on another ground in other contexts. For example, a gay man accessing services geared toward persons of his race, ancestry, ethnic origin or place of origin may be subjected to comment by a service worker that gay people "don't belong in our culture". At another time, he may experience discrimination based on race or culture-related grounds in his volunteer work with a gay community organization. Or, he may experience discrimination based on all of these grounds at once.

A complaint involving sexual orientation may involve any other ground under the *Code*, and a person may experience discrimination based on several characteristics or aspects of their identity at the same time. For example, a lesbian with a disability may be seen as a lesbian, a woman, or a person with a disability, and thus be exposed to discrimination or harassment based on her sexual orientation, sex, or disability, or on a combination of these (and other) grounds. Discrimination or harassment relating to one ground may have a greater negative impact on persons due to the vulnerability they experience stemming from the other grounds.

Different aspects of a person's identity may intersect in such a way that the person may be exposed to stereotyping and discrimination that is unique and distinct to that combination of grounds. For example, a gay man may be seen as a man, and as a gay or homosexual person generally. However, he may be exposed to an intersectional form of discrimination on the basis of being identified as a "gay man", because of unique stereotypes about gay men that are distinct from those about lesbian or bisexual people, or about men in general.

> **Example:** When a gay man working at a family services agency took sick leave, rumours circulated in his workplace that he had AIDS. Later, he was falsely rumoured to be sexually abusing his adolescent male foster child. He complained to the employer about the rumours, but was terminated for reasons relating to the unfounded allegations. The Board found that the man had been subjected to harassment, a poisoned work environment, discrimination and reprisal.[49]

In this case, the individual suffered discrimination based on specific stereotypes about sex, sexual orientation, family status, and disability.

7. Organizational Responsibility

The ultimate responsibility for a healthy and inclusive environment rests with employers, landlords, unions, vocational and professional organizations, service providers, and other organizations and institutions covered by the *Code*. There is an obligation to ensure that environments are free from discrimination and

harassment. It is not acceptable from a human rights perspective to choose to remain unaware of the potential existence of discrimination or harassment, or to ignore or fail to act to address human rights matters, whether or not a complaint has been made.

An organization violates the *Code* where it directly or indirectly, intentionally or unintentionally infringes the *Code,* or where it does not directly infringe the *Code* but rather authorizes, condones, adopts or ratifies behaviour that is contrary to the *Code.* Organizations should ensure that rules, policies, procedures, decision-making processes and organizational culture are non-discriminatory on their face, and do not have a discriminatory impact.

In addition, there is a human rights duty not to condone or further a discriminatory act that has already occurred. To do so would extend or continue the life of the initial discriminatory act. The obligation extends to those who, while not the main actors, are drawn into a discriminatory situation nevertheless, through contractual relations or otherwise.[50] An organization should also not punish a person because of how they responded to harassment:

> **Example:** A woman's co-worker verbally harassed her because of sex and sexual orientation. After a couple of months, she complained to her manager, who told them to stay away from each other. However, the co-worker continued to make negative comments to other staff about her. When she reported this again to her manager, he told her she should figure out how to resolve the problem. When he found out that she had complained to the police, the employer terminated her. The court found the employer liable for the offensive conduct, his failure to respond appropriately to her complaints, and for the role her police complaint played in his decision to terminate her. [51]

Unions, vocational, and professional organizations are responsible for ensuring that they are not engaging in, condoning, or contributing to discrimination or harassment. They may be liable for discriminatory policies or actions to the same extent as an employer, and share the same obligation to take measures to address harassment or a poisoned environment.

Human rights decisions frequently find organizations liable, and assess damages, based on an organization's failure to respond appropriately to address discrimination and harassment. An organization may respond to complaints about individual instances of discrimination or harassment, but they may still be found to have failed to respond appropriately if the problem is not resolved. There may be a poisoned environment, an organizational culture that excludes or marginalizes persons based on sexual orientation, or an ongoing pattern of homophobic comments or incidents, despite sanction of individual harassers. In these cases, the organization should take further steps, such as training and education, in order to more appropriately address the problem.

The following factors have been suggested as considerations for determining whether an organization met its responsibilities to respond to a human rights complaint:

- procedures in place at the time to deal with discrimination and harassment;
- the promptness of the institutional response to the complaint;
- the seriousness with which the complaint was treated;
- resources made available to deal with the complaint;
- whether the organization provided a healthy work environment for the person who complained; and
- the degree to which the action taken was communicated to the person who complained.[52]

For more information, see also section **9. Preventing and Responding to Homophobia and Discrimination Based on Sexual Orientation**.

7.1 Vicarious Liability

Under section 45 of the *Code*, a corporation, trade union or occupational association, unincorporated association or employer's organization will be held responsible for discrimination, including acts or omissions, committed by employees or agents in the course of their employment. This is known as vicarious liability. It applies not only to human rights violations in the workplace, but also in housing accommodation, goods, services and facilities, contracting, and membership in unions and vocational associations.

Simply put, it is the Commission's position that vicarious liability automatically attributes responsibility for discrimination to an organization for the acts of its employees or agents, done in the normal course, whether or not it had any knowledge of, participation in, or control over these actions.

Vicarious liability does not apply to breaches of the sections of the *Code* dealing with harassment. However, in these cases the "organic theory of corporate liability" may apply. In addition, since the existence of a poisoned environment is a form of discrimination, it is the Commission's position that when harassment amounts to or results in a poisoned environment, vicarious liability under section 45(1) of the *Code* is restored.

7.2 The "Organic Theory" of Corporate Responsibility

An organization may be liable for acts of harassment carried out by its employees if it can be proven that it was aware of the harassment, or the harasser is shown to be part of the management or "directing mind" of the organization. In such

cases, the decisions, acts, or omissions of the employee will engage the liability of the organization where:

- The employee who is part of the "directing mind" engages in harassment or inappropriate behaviour that is contrary to the *Code*; or
- The employee who is part of the 'directing mind" does not respond adequately to harassment or inappropriate behaviour of which he or she is aware, or ought reasonably to be aware.

  Example: An employee informed his manager that he was being subjected to discriminatory rumours in the workplace related to his sexual orientation. The manager failed to take appropriate steps to investigate the rumours or to advise senior management, and subsequently filed a misleading report leading to the employee's termination. The board found the organization vicariously liable for the discriminatory gossip, the manager's failure to investigate and address it, and the manager's misleading report. The board also held the organization to be directly liable for the failure to deal with the discriminatory rumours and for the manager's misleading report, on the basis of the "organic theory" of corporate liability.[53]

Generally speaking, managers and central decision-makers in an organization are part of the "directing mind". Employees with only supervisory authority may also be part of the "directing mind" if they function, or are seen to function, as representatives of the organization. Even non-supervisors may be considered to be part of the "directing mind" if they have *de facto* supervisory authority or have significant responsibility for the guidance of employees. For example, a member of the bargaining unit who is a lead hand may be considered to be part of the "directing mind" of an organization.

8. Employment, Services, and Housing

Employment, Services, and Housing are the grounds most commonly cited in complaints of discrimination based on sexual orientation. As in all social areas, employers, service providers and landlords should be aware of their obligations under the Code, and understand their corporate responsibility as described in section 7. Organizational Responsibility. There are many steps that prudent organizations can take to prevent and appropriately respond to complaints. For further guidance, see section **9. Preventing and Responding to Homophobia and Discrimination Based on Sexual Orientation.**

8.1 Employment

Section 5(1) of the *Code* provides that every person has a right to equal treatment in employment without discrimination because of sexual orientation and marital status. The majority of complaints of discrimination based on sexual

orientation relate to employment. Denying or restricting employment opportunities in hiring, training, promotion, transfers, *etc.* because of sexual orientation or same-sex marital status is a violation of the *Code*.

> **Example**: An employee discloses that he is gay to his manager. The manager subsequently tells the employee that he will no longer qualify for promotions, postings, or further career training.[54]

> **Example**: A woman works for a company on a temporary contract in the same department as her same-sex partner. An "out" lesbian, she has been subject to homophobic comment from management. Her supervisor offers her a full-time position, but stipulates that to protect company security, her partner will be transferred to another department in the company. He claims that the same requirement would be imposed were she heterosexual. She questions the company's consistency in applying this rule to heterosexual workers and suggests alternatives, but the company terminates her without further discussion. [55]

In this case, the Board of Inquiry found that the company had discriminated against the employee and, specifically, that employer discomfort with her sexual orientation and her openness about it was a factor in her termination.

Individuals with same-sex spouses, as defined under "marital status" in section 10(1) of the *Code*, are entitled to the same employment-related benefits as individuals with opposite-sex spouses. This may include such as employee superannuation or pension plans or funds, or a contract of group health insurance between an insurer and an employer, even if it complies with other relevant legislation and regulations.

Employers must ensure that they are not discriminating in extending opportunities, such as in hiring, promoting, providing training or mentoring, or in other decision-making, including termination or discipline.

> **Example:** When a gay man's co-worker finds out that he is HIV-positive, she complains to management, who terminates him. When he files a human rights complaint, the employer claims not to have known his HIV status, but states that it would present a health and safety risk. They allege that he was terminated for inappropriate sexualised comments in the workplace. However, there was no evidence that they had investigated or substantiated these allegations prior to the termination, and they did not establish that being HIV-negative was a *bona fide* requirement for the position.

Employers should be able to provide non-discriminatory reasons for decisions and assessments affecting employees, and ensure that they are not causing or condoning discrimination or harassment in the workplace. See section **9.**

Preventing and Responding to Homophobia and Discrimination Based on Sexual Orientation, and the Commission's publication *Human Rights at Work* for more information about preventing and responding to human rights complaints in employment. [56]

8.2 Services

Section 1 of the *Code* provides that every person has a right to equal treatment with respect to services, goods, and facilities, without discrimination because of sexual orientation.

> **Example**: A municipality that provides the service of issuing proclamations must do so in a non-discriminatory manner. Refusal to proclaim "Gay and Lesbian Pride" events has been found to be discriminatory in several cases. [57] In one instance, the event was proclaimed, but the proclamation was altered and the word "Pride" eliminated. This was also found to be discriminatory.[58]

> **Example**: A representative of a gay community organization went to a printing company to have some of its business materials printed. The owner of the company, upon discovering that the job was for a gay organization, refused to print the materials citing his religious beliefs on sexual orientation.[59]

> **Example**: An all-male team of police officers entered a "women only" night at a bathhouse for investigation of alleged liquor license infractions. The committee organizing the event filed a complaint alleging discrimination of the basis of sex and sexual orientation. They alleged that despite having advance knowledge of the nature of the event, the police service scheduled male officers to investigate, although female officers were available. They also alleged that the officers remained much longer than the investigation required, observing numerous women in various states of undress. The negotiated settlement included a comprehensive training program for all officers, involving consultation with the complainants and the community, and clear objectives and reporting requirements.[60]

Service providers must respond appropriately to complaints of discrimination and harassment. They should investigate individual incidents and sanction the persons responsible, but may also need to take other measures to effectively address the problem.

> **Example:** A student was subjected to years of homophobic harassment by other students in his secondary school. Although the school board reacted to specific instances of harassment by sanctioning the individual harassers, it did not take further measures to address the ongoing pattern

of harassment. The school board was found responsible for discrimination, having failed to provide an educational environment free from discriminatory harassment. [61]

The Commission has addressed similar situations in Ontario, mediating settlements with broad systemic remedies designed to curb further discrimination and harassment on the grounds of sexual orientation.[62]

8.3 Accommodation (Housing)

Section 2(1) of the *Code* provides that every person has a right to equal treatment with respect to the occupancy of accommodation (housing) without discrimination because of sexual orientation.

Landlords must ensure that they are not denying housing to individuals based on sexual orientation or other *Code* grounds. They must likewise ensure that their treatment of current tenants and decisions about termination of tenancy are non-discriminatory and not influenced by subjective judgements relating to sexual orientation.

> **Example**: Two gay students respond to an advertisement for a house that is for rent and arrange to view the house and meet with the owner. A few days later, they contact the owner and advise him that they wish to rent the house. At their second meeting with the owner of the house he asks them if they are gay and proceeds to tell them that he does not rent to gays.[63]

Landlords must also address any discrimination or harassment relating to sexual orientation that may arise within their rental housing environment, whether between tenants, or involving agents of the landlord, or others who are part of the housing environment, such as contracted maintenance workers.

> **Example:** A tenant complains that the superintendent and another tenant are verbally harassing him and making false accusations against him because of his sexual orientation and religion.

> **Example:** A landlord discovers homophobic and racist graffiti on a wall in a public area of her apartment building.

> **Example:** A woman complains to a landlord that the building manager stopped doing maintenance in her unit and responding to her phone calls after her same-sex partner moved in.

If landlords become aware of discrimination or harassment, either through a complaint or other means, they must respond appropriately. Landlords who fail to

take steps to address a poisoned environment or a complaint of discrimination or harassment may be found liable.

9. Preventing and Responding to Homophobia and Discrimination Based on Sexual Orientation

Organizations and workplaces can take a number of steps to prevent and appropriately address human rights complaints. The following are particularly important elements of an organization's strategy to address human rights issues as they may arise with respect to sexual orientation:

- Protection of confidentiality of information
- Barrier review
- Development and promotion of anti-harassment and anti-discrimination policies that address homophobia.
- A complaint resolution procedure

9.1 Protecting Confidentiality of Information

Confidentiality can be particularly important for bisexual, lesbian, and gay individuals. An employer or service provider who legitimately requires and collects personal information that either directly or indirectly identifies an individual's sexual orientation must ensure the maximum degree of privacy and confidentiality of the information. This applies in all situations and circumstances including employment records and files, insurance company records, medical information, *etc.* The information might be required to enable an employee or individual to claim or register for benefits, to apply for an apartment, or for other purposes.

Confidential Information that might be collected could include:

- identification of next of kin;
- identification of beneficiary for insurance purposes; and
- a claim for benefits for a same-sex spouse.

All information should remain exclusively with designated personnel (such as the human resources person) in a secure filing system in order to protect the individual's confidentiality. An employer or service provider who fails to properly safeguard personal information about an individual's sexual orientation may infringe the *Code*, and a complaint can be made where this results in a person being subjected to discrimination and/or harassment because of their sexual orientation or same-sex partnership status.

9.2 Barrier Review and Removal

Organizations may have rules, criteria, or internal policies, practices and decision-making processes that perpetuate systemic discrimination and create barriers for gay, lesbian, and bisexual people, as well as individuals identified by other *Code* grounds.[64] In general, informal processes are much more likely to lead to subconsciously biased decision-making, and may allow biased decisions and behaviours (whether intentional or not) to go unnoticed and uncorrected by the organization or company.

Some examples include:[65]

Barrier: Relying on personal networks, social relationships, supervisor discretion or word-of-mouth referrals to recruit for vacancies or to extend opportunities such as training or career advancement. These types of informal processes often exclude those who do note share the same characteristics as the recruiter, management, or other organization members.
Best practices: Formal announcements or postings should list requirements or criteria related to the essential requirements for the position or opportunity, and be widely distributed so that they can readily come to the attention of a diverse applicant pool. Information about internal opportunities should be shared with all employees or organizational members.

Barrier: Staffing or membership decisions based on informal processes. For example, conducting an interview by chatting with the applicant to see if he or she shares similar interests and will "fit" into the organizational culture may present a barrier for persons who are or appear different than the dominant norm in the organization.
Best practices: Formal interviews or reviews, conducted by multiple-person panels, using preset questions and scoring the answers against a pre-determined answer guide, help to eliminate bias. Criteria and questions must relate to ability to perform the essential duties of the job or meet objective, non-discriminatory organizational requirements, rather than focusing on subjective, unclear considerations such as whether the person exhibits "confidence" or is "suitable".

Barrier: Undefined policies for sanction, discipline or termination, or uneven application of such policies. These are a common basis for human rights complaints.
Best practices: Decisions to sanction an individual should be based in clearly defined, objective criteria, and related to identified job or organizational requirements. Well-documented, evenly applied progressive discipline, sanction, or performance management practices help organizations prevent or respond to human rights complaints. Information

about policies and criteria should be shared with all persons to whom they are applicable.

In hiring, extending opportunities, assessing performance, and in other decision-making, employers, landlords, service providers, and other organizations should establish non-discriminatory criteria and processes, and follow them consistently. They must ensure that they are not treating individuals differently because of factors that may relate to a ground under the *Code*, and that their processes do not have a discriminatory effect, even if unintentional. Assessments should be made based on the requirements of the job, service, or organization, not on external factors.

If there is a human rights complaint, organizations, landlords, and employers may be asked to provide evidence of how a decision was made, and that it was not based, even in part, on discriminatory criteria.

9.3 Anti-Harassment and Anti-Discrimination Policies

Organizations should be pro-active in creating fair and equitable environments. Anti-discrimination and anti-harassment policies are valuable tools in promoting equity and diversity within an organization. Adoption and implementation of these policies can also help to limit potential harm, and reduce the organization's liability in the event of a complaint. These policies should explicitly address discrimination based on sexual orientation.

These elements should be developed in co-operation with workplace or organization partners where they exist, such as unions. Unions are important partners in the creation of a non-discriminatory workplace. As part of a "best practices" initiative, they should work with employers in the development of internal policies and procedures. Unions should also take a pro-active role in human rights training and education for their members specifically, and for the entire workplace in general.

9.3.1 Developing anti-discrimination and anti-harassment policies

The following are suggested contents for an organization's anti-discrimination and anti-harassment policy:

- A statement setting out the organization's commitment to a fair and equitable environment free of discrimination and harassment, clarifying that discrimination and harassment will not be tolerated by the organization.
- A statement of rights and obligations, including:
    - The rights of organization members, employees, or other associated personnel
    - rights of clients, tenants, or customers;
    - organizational, employer, and/or management obligations;

  - union or other workplace partner obligations;
  - an explanation of corporate liability for the behaviour of officers, managers, employees, *etc.*; and
  - a statement indicating that no reprisals are permitted or will be taken against an individual making a complaint.
- A list of the prohibited grounds of discrimination in the *Code.*
- The *Code* definitions of "harassment" and "sexual harassment".
- An explanation of the concept of a "poisoned environment" as a violation of the *Code.*
- Description/examples of unacceptable behaviour, such as:
  - refusal to hire, promote, or provide service or accommodation based on a ground listed in the *Code*;
  - examples of harassment based on a ground listed in the *Code*; and
  - examples of what would constitute discrimination or harassment based on sexual orientation, sex, marital status, *etc.*
- How internal complaints will be handled, including:
  - to whom is the complaint made;
  - confidentiality; and
  - length of time for complaint to be investigated.
- Disciplinary measures that will be applied if a claim of harassment or discrimination is proven.
- Remedies that will be available if the claim of harassment or discrimination is proven, such as:
  - an oral or written apology from the harasser/person who discriminated and the organization or company;
  - recovery of losses, such as wages, benefits, promotion or services that were denied; and/or
  - compensation for injury to dignity.
- A statement reinforcing the right of individuals to go to the Commission at any time during the internal process, and
- An explanation of the 6-month time requirement in the *Code.*

9.3.2 Promoting anti-discrimination and anti-harassment policies

All employees or organization members should be aware of internal policies and any procedures in place for resolving complaints. This can be done by:

- distributing policies to all employees or organization members;
- providing an overview and copies of the policies in any orientation process for new employees, management or members;
- training the management team on the contents of the policies;
- posting information about the policies where staff and/or clients can see it; and
- where a problem has been identified, providing ongoing education on human rights issues.

In an organization that does not provide training in anti-discrimination and human rights, managers may be unaware of what constitutes discrimination or harassment and how barriers operate to exclude people. Ongoing training in human rights and anti-discrimination, including anti-homophobia, should be an integral part of training for all employees, and particularly for those who act in a supervisory capacity. It should be made clear that human rights are part of the organization's culture and goals and that the training is not simply "window dressing" to comply with human rights laws.

For more information see the Commission documents *Human Rights at Work*, and *Developing Procedures to Resolve Human Rights Complaints Within Your Organization.*[66]

ENDNOTES

[1] In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.), the Board of Inquiry applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that Commission policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

[2] For example, *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Attorney General of Ontario v. M. and H.*, [1999] 2 S.C.R.; *Halpern* v. *Canada (Attorney General)* (2003), 65 O.R. (3d) 161(C.A.).

[3] *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 173 per Cory, J.

[4] Aboriginal people who are transsexual or transgendered or intersex may also refer to themselves and their gender identity as "two-spirited".

[5] *Toonen v. Australia*, 1994: *Views of the Human Rights Committee under article 5, paragraph 4, of the optional Protocol to the International Covenant on Civil and Political Rights*, UNHRCOR, 50th Sess., Communication No. 488 (1994).

[6] *Young v. Australia*, 2003: *Views of the Human Rights Committee under the optional Protocol to the International Covenant on Civil and Political Rights*, UNHRCOR, 78th Sess., Communication No. 941 (2003).

[7] The United Nations Committee on Economic, Social and Cultural Rights has specified that, as it threatens health, discrimination on the basis of sexual orientation is a violation of rights under Article 2.2 of the *International Covenant on Economic, Social and Cultural Rights (*General Comment No. 14 (2000).

United Nations Commission on Human Rights adopted a resolution on extrajudicial, summary or arbitrary executions in April, 2002, calling on governments to investigate "promptly and thoroughly cases of … all killings committed for any discriminatory reason, including sexual orientation… and to bring those responsible to justice before a competent, independent and impartial judiciary, and to ensure that such killings are neither condoned nor sanctioned by government officials or personnel".

United Nations High Commissioner for Refugees (UNHCR) also extends protection based on sexual orientation, indicating that gay and lesbian persons facing attack, inhumane treatment, or serious discrimination, and whose governments are unable or unwilling to protect them, should be recognized as refugees: UNHCR, *Protecting Refugees: Questions & Answers* (Geneva, UNHCR, 1996).

Other United Nations conventions may provide protections to gay, lesbian or bisexual persons, although sexual orientation may not be specifically mentioned. For example, Convention against Torture and Other Cruel, Inhuman or Degrading Punishment (1984), Convention on the Elimination of All Forms of Discrimination Against Women (1981), and Convention on the Rights of the Child (1989) (article 2).

[8] Criminal laws against consensual sexual relations violate the right to privacy under Article 8 (*Dudgeon v United Kingdom* (1981), 3 E.H.R.R. 40; *Norris v Ireland* (1991), 13 E.H.R.R. 186), and that such laws must be fully repealed (*Modinos v Cyprus* (1993),16 E.H.R.R. 485). The Court has similarly found that bans on military service (Lustig-Prean and Beckett v UK: *Lustig-Prean and Beckett v United Kingdom* (1999), [2000] 29 E.H.R.R. 548) and denial of custody (*Salgueiro da Silva Mouta v Portugal* (1999), [2001] 31 E.H.R.R. 47) based on sexual orientation violate

Article 8. In the latter case, the Court also affirmed that Article 14 protection against discrimination is to be interpreted as including sexual orientation. Article 14 has subsequently been used to affirm the family rights of same-sex couples (*Karner v Austria* (2003), [2004] 38 E.H.R.R. 24), and to find that differing ages of consent for heterosexual and homosexual relations are discriminatory (*L. v Austria* (2003), 36 E.H.R.R. 55; *S.L. v Austria* (2003), 37 E.H.R.R. 39).

[9] The *Treaty of Amsterdam*, which came into effect on May 1, 1999, establishes human rights provisions on a number of grounds, and empowers the EU to take appropriate action to combat discrimination.

In December, 2000, the Council of the European Union issued a Directive on equal treatment in employment and occupation, barring employment discrimination based on sexual orientation and other grounds. The directive is binding on member states, and national implementation is a condition for states wishing to join the EU.

The *Charter of Fundamental Rights of the European Union*, signed in December, 2000 by the Presidents of the European Parliament, the Council of the European Union and the European Commission, explicitly prohibits discrimination based on sexual orientation (Article 21 (1)).

[10] *Life Together*, A Report on Human Rights in Ontario (Ontario Human Rights Commission, 1977).

[11] *Sexual Orientation Strategies*, Options Paper (December 1996: Ontario Human Rights Commission, unpublished).

[12] *Constitution Act*, 1982, Part I.

[13] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R 143.

[14] *Egan v. Canada*, [1995] 2 S.C.R. 513.

[15] *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[16] *Leshner v. Ontario (No. 2)* (1992), 16 C.H.R.R. D/184 (Ont. Bd. Inq.), *Dwyer and Simms v. Municipality of Metropolitan Toronto & Attorney General of Ontario* Unreported decision, September 27, 1996, Ont. Bd. Inq.

[17] In *Leshner v. Ontario (No. 2)* (1992), 16 C.H.R.R. D/184 (Ont. Bd. Inq.), the Board of Inquiry ordered the provincial government to "read down" the opposite-sex definition of marital status in the *Code* and to provide equivalent survivor benefits to its gay and lesbian employees through an arrangement outside of the existing pension plan.

In *Attorney General of Ontario v. M. and H.*, [1999] 2 S.C.R. 3 ("M. v. H"), the Supreme Court of Canada found that that the opposite-sex definition of "spouse" in section 29 of Ontario's *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*"), which precluded "M" from making an application for support from her former same-sex partner of 12 years, constituted a denial of the equality rights in section 15 of the *Charter*. Writing for the majority, Cory J. stated:

The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from the benefits of s. 29 of the FLA promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances (at para. 73).

[18] *Attorney General of Ontario v. M. and H.*, [1999] 2 S.C.R. 3.

[19] *Family Law Act*, R.S.O. 1990, c. F.3.

[20] *Attorney General of Ontario v. M. and H.*, [1999] 2 S.C.R. 3 at para. 73, per Cory J.

[21] Letter from Letter from Chief Commissioner Keith C. Norton, Q.C., B.A., LL.B to Hon. James Michael Flaherty, Attorney General of Ontario (Feb. 8, 2000) Toronto.

[22] *Halpern* v. *Canada (Attorney General)* (2003), 65 O.R. (3d) 161(C.A.). This case combined two applications brought to the courts by several couples in Toronto, and directly addressed the exclusion of same-sex couples from the institution of marriage. One application was brought in August, 2000, by seven gay and lesbian couples whose requests for marriage licences had been held in abeyance by the clerk of the City of Toronto, while she applied to the Court for directions. The other application was made by two couples who were issued marriage certificates by their minister in January 2001. Their marriages were solemnized by an ancient Christian tradition, called the publication of banns, which was lawful in Ontario; however, the Registrar general refused to register the documents, citing an alleged federal prohibition against same-sex marriage.

[23] In an earlier decision, (*EGALE Canada Inc.* v. *Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.), the British Columbia Court of Appeal had also found the definition of marriage unconstitutional and had amended the definition but had suspended the remedy until July 2004 to allow a legislative response. However, in light of the immediate effect of the Ontario decision and the fact that the federal government chose not to appeal it, on July 8, 2003, the BC Court changed its order to allow the reformulated definition of marriage to apply immediately.

Similarly, on March 19, 2004, the Quebec Court of Appeal upheld a lower court decision that declared the opposite-sex definition of marriage unconstitutional, and lifted the delayed effect of the ruling so same-sex couples had the immediate right to marry in Quebec (*Hendricks* v. *Canada (Attorney General)* (2004), 238 D.L.R. (4th) 577 (Que.C.A.).

[24] For example: *Dunbar v. Yukon Territory*, [2004] Y.J. No. 61, 2004 YKSC 54; *Vogel v. Canada (Attorney General)*, [2004] M.J. No. 418; *Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357; *N.W. v. Canada (Attorney General)*, [2004] S.J. No. 669, 2004 SKQB 434.

[25] In response to *Halpern*, in July of 2003, the federal Minister of Justice submitted a draft Bill to the Supreme Court of Canada for an opinion, in a process known as a reference. The Bill defined civil marriage as "the lawful union of two persons to the exclusion of all others". The Supreme Court rendered its opinion on December 9, 2004, indicating that extension of marriage rights to same-sex couples is consistent with s. 15(1) of the *Charter*. Bill C-38, known as the *Civil Marriage Act*, S.C. 2005, c. 33 was then introduced into Parliament.

[26] The Ontario *Spousal Relationships Statute Law Amendment Act*, 2005, S.O. 2005, c. 5 (Bill 171).

[27] This codified the definition of marriage for the first time in Canadian law, and made Canada the fourth nation in the world to legalize same-sex marriage, following Belgium, the Netherlands, and Spain.

[28] During the legal and legislative proceedings that culminated in the *Civil Marriage Act*, the question of protection of religious freedoms with regard to performing same-sex marriages has became the subject of significant political, legal and social debate. Amendments to both the *Code* and Ontario's *Marriage Act* clarified existing protections of religious belief to address the specific matter of solemnization of same-sex marriages. Section 18(1) of the *Code*, and 20(6) of the *Marriage Act* clarify that religious officials (those registered under s. 20 of the *Marriage Act)* may refuse to solemnize or assist in solemnizing same-sex marriages, and to refuse to allow a sacred place to be used for this purpose, due to religious belief.

[29] *Trinity Western University* v. *British Columbia College of Teachers*, [2001] 1 S.C.R. 772. Trinity Western University ("TWU") had been denied approval of a teacher education program by the British Columbia College of Teachers on the basis that it was contrary to the public interest because TWU appears to follow discriminatory practices. TWU offers education within a "Christian context" and requires students to sign a document outlining "Community Standards" containing a prohibition of "homosexual behaviour". The Court concluded that, due to the absence of concrete evidence that the training teachers would receive at TWU would foster discrimination in the public schools of British Columbia, the freedom of individuals to adhere to certain religious beliefs while at

TWU should be respected. However, the Court held that the freedom to hold these beliefs is broader than the freedom to act on them, and acknowledged that teachers must understand the pluralistic and diverse nature of Canadian society. A teacher in a public school who acts on these beliefs in a discriminatory manner would still be subject to disciplinary proceedings.

In *Hall v. Powers* (2002), 213 D.L.R (4th) 308 (Ont.S.C.J.), the Ontario Superior Court granted an interlocutory injunction restraining the Durham Catholic District School Board from preventing Marc Hall's attendance at his high school prom with his boyfriend. The Court was called upon to balance Hall's s. 15 *Charter* right to be free from discrimination on the basis of his sexual orientation with the right to freedom of religion in s. 2(a) of the *Charter* and the protection of denominational school rights in s. 93(1) of the *Constitution Act, 1867*. The Court recognized a diversity of opinion within the Catholic community with regard to homosexuality, and found that the restrictions imposed on Mr. Hall rights were not defensible under section 1 of the *Charter*.

In *Brockie* v. *Brillinger* (No. 2) (2002), 222 D.L.R. (4th) 174 (Ont. Sup. Ct. Div. Ct.), the Ontario Divisional Court considered whether a Board of Inquiry decision on the complaint of discrimination in a service because of sexual orientation infringed Scott Brockie's right to freedom of religion under s. 2 of the *Charter*. The Board of Inquiry had found that Brockie and Imaging Excellence Inc. denied services to Ray Brillinger and the Canadian Lesbian and Gay Archives contrary to the *Code*, and ordered Brockie and Imaging to provide the same printing services to lesbian and gay people, and to organizations in existence for their benefit, that they provide to other members of the public. The Divisional Court cited *R.* v. *Big M Drug Mart Limited* (1985), 18 D.L.R. (4th) 321, Dixon C.J.C, noting that service of the public in a commercial service must be considered at the periphery of activities protected by freedom of religion. However, the Court held (at para. 56) that the objectives of the *Code* must be balanced against Mr. Brockie's right to freedom of religion and conscience. The Court narrowed the Tribunal's order to clarify that Mr. Brockie would not be required to print material which could reasonably be considered to be in direct conflict with the core elements of his religious belief [at para. 58].

[30] *Trinity Western University* v. *British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 29.

[31] *Ontario Human Rights Commission v. Brockie*, [2002] O.J. No. 2375 (Ont. Sup. Ct.).

[32] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174.

[33] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [hereinafter *"Law"*].

[34] *Waterman* v. *National Life Assurance Co. of Canada* (No. 2) (1993), 18 C.H.R.R. D/176 (Ont. Bd. Inq.).

[35] *Berry v. Manor Inn* (1980) 1 C.H.R.R. D/152.

[36] *Crozier v. Asseltine* (1994), 22 C.H.R.R. D/244 at para. 9 (Ont. Bd. Inq.).

[37] *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

[38] *Dhanjal* v. *Air Canada* (1996), 28 C.H.R.R. D/367 (C.H.R.T.).

[39] *Schnell* v. *Machiavelli and Associates Emprize Inc* (No. 2) (2002), 43 C.H.R.R. D/453 at paras. 59-63 (C.H.R.T.).

[40] *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 123.

[41] *Gill* v. *British Columbia (Ministry of Health)* (No. 1) (2001), 40 C.H.R.R. D/321(BCHRT).

[42] *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3.

[43] *Gill* v. *British Columbia (Ministry of Health)* (No. 1) (2001), 40 C.H.R.R. D/321(BCHRT).

[44] *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3.

[45] *Gill* v. *British Columbia (Ministry of Health)* (No. 1) (2001), 40 C.H.R.R. D/321, 2001 (BCHRT).

[46] *North Vancouver School District No. 44* v. *Jubran* (2005), 39 B.C.L.R. (4th) 153 (B.C.C.A.); *Ontario Human Rights Commission* v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536.

[47] It is important to note that sexual harassment and inappropriate gender-related comments or conduct are prohibited regardless of the gender or sexual orientation of the parties involved. For more information, see the Commission's *Policy on Sexual Harassment and Inappropriate Gender-Related Comments and Conduct.*

[48] *Baczkowski* v. *Suffesick* (2000), 43 C.H.R.R. D/240 (Y.T. Bd. Adj.).

[49] *Moffat v. Kinark Child and Family Services* (1998), 35 C.H.R.R. D/205 (Ont. Bd. of Inq.).

[50] *Payne* v. *Otsuka Pharmaceutical Co. (No. 3)* (2002), 44 C.H.R.R. D/203 (Ont. Bd. Inq.) at para. 63. The nature of when a third party or collateral person would be drawn into the chain of discrimination is fact specific. However, general principles can be determined. The key is the control or power that the collateral or indirect respondent had over the complainant and the principal respondent. The greater the control or power over the situation and the parties, the greater the legal obligation not to condone or further the discriminatory action. The power or control is important because it implies an ability to correct the situation or do something to ameliorate the conditions.

[51] *Baczkowski* v. *Suffesick* (2000), 43 C.H.R.R. D/240 (Y.T. Bd. Adj.)

[52] *Wall* v. *University of Waterloo* (1995), 27 C.H.R.R. D/44 (Ont. Bd. Inq.). These factors assist in assessing the reasonableness of an organization's response to harassment. A reasonable response by the organization will not affect its liability but will be considered in determining the appropriate remedy. In other words, an employer that has reasonably responded to harassment is not absolved of liability but may face a reduction in the damages that flow from the harassment.

[53] *Moffat v. Kinark Child and Family Services* (1998), 35 C.H.R.R. D/205 (Ont. Bd. of Inq.).

[54] *Haig v. Canada* (1991), 5 O.R. (3d) 245 (Gen. Div.).

[55] *Waterman* v. *National Life Assurance Co. of Canada* (No. 2) (1993), 18 C.H.R.R. D/176 (Ont. Bd. Inq.).

[56] Human Resources Professionals of Ontario & Ontario Human Rights Commission, *Human Rights at Work* (Toronto: Government of Ontario, 2004).

[57] *Hudler v. London (City)* (1997), 31 C.H.H.R. D/500 (Ont. Bd. Inq), *Hill v. Woodside* (1998), 33 C.H.R.R. D/349 (N.B. Bd. Inq.), *Oliver v. Hamilton (City)* (1994), 24 C.H.H.R. D/293 (Ont. Bd. Inq.), *Rainbow Committee of Terrace* v. *Terrace* (City) (2002), 43 C.H.R.R. D/413 (BCHRT).

[58] *Hughson v. Kelowna (City)* (2000), 37 C.H.R.R. D/122 (BCHRT).

[59] *Brockie* v. *Brillinger* (No. 2) (2002), 222 D.L.R. (4th) 174 (Ont. Sup. Ct. Div. Ct.).

[60] Ontario Human Rights Commission, *Annual Report 2004-2005*, p. 57

[61] *North Vancouver School District No. 44* v. *Jubran* (2005), 39 B.C.L.R. (4th) 153 (B.C.C.A.). The Supreme Court of Canada denied the school board's application for leave to appeal (*North Vancouver School District No. 44 v. Jubran*, [2005] S.C.C.A. No. 260).

[62] For example, the Lakehead District School Board agreed to a number of measures, including adopting and promoting an equity statement, developing a document on prevention of homophobic harassment, drafting a diversity plan and providing training and education for staff and students on understanding sexual diversity issues (Ontario Human Rights Commission News Release, "Commission mediates settlement with school board in sexual orientation complaint" (8 September, 2005)).

[63] *Quebec c. Martin* (1997), 33 C.H.R.R. D/487 (Trib. Qué.).

[64] Physical and technological barriers should also be identified and removed, to eliminate discrimination and increase access for older persons and persons with disabilities.

[65] For more information see Ontario Human Rights Commission, *Human Rights at Work*, which explains the types of questions that are and are not permitted at various stages in the recruitment process: Human Resources Professionals of Ontario & Ontario Human Rights Commission, *Human Rights at Work* (Toronto: Government of Ontario, 2004) at 40-50. The Appendix to the Commission's *Policy and Guidelines on Racism and Racial Discrimination*, also provides numerous examples of systemic barriers and best practices in a workplace setting.

[66] Human Resources Professionals of Ontario & Ontario Human Rights Commission, *Human Rights at Work* (Toronto: Government of Ontario, 2004); and Ontario Human Rights Commission, *Developing Procedures to Resolve Human Rights Complaints Within Your Organization* (Toronto: Queen's Printer, 1996)